DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CA06-504

FEBRUARY 14, 2007

JAMES SOUTHALL AND LYNDA SOUTHALL

APPELLANTS

V.

TERRY HILL AND CAROLYN HILL

APPELLEES

APPEAL FROM THE MONTGOMERY COUNTY CIRCUIT COURT
[NO. CV-04-18]
HON. J.W. LOONEY, JUDGE

AFFIRMED

This lawsuit is about a dispute over the ownership of 6.47 acres of land lying west of Sugarloaf Creek in the Southeast Quarter of the Southeast Quarter, Section 36, Township 4 South, Range 23 West in Montgomery County. Appellants Lynda and James Southall appeal from an order of the Montgomery County Circuit Court quieting title in them to only a portion of the disputed tract. We affirm.

On May 22, 1974, the Southalls received a deed for property in Section 36 of Township 4 South, Range 23 West containing "438 acres more or less." The part of the property that included the acreage in dispute was described in the Southalls' deed as follows: "that part of the Southeast Quarter (SE1/4) of the Southeast Quarter (SE1/4) lying East of Sugar Loaf Creek (38 Acres)." On April 30, 1951, Maudie and Jerry Burchfield, predecessors in title to appellees, conveyed to Iva and Myrkle Forga 82 acres in section 36

of Township 4 South, Range 23 West, including "[a]ll that part of the Southeast quarter of the Southeast quarter . . . lying and being west of Sugar Loaf Creek, containing Two (2) acres, more or less." This deed also conveyed the "SW1/4 SE1/4" and the "SE1/4 SW1/4" in Section 36. In 1975, the Forgas conveyed "180 acres, more or less" to Ardis Ann and Elmer Benson, including all of the land they received from the Burchfields except for "that part of the Southeast quarter of the Southeast quarter . . . lying and being west of Sugar Loaf Creek, containing Two (2) acres, more or less." This parcel was not mentioned in the Bensons' deed.

In 1998, the Bensons conveyed to appellees Carolyn and Teddy Hill the 180-acre tract they had received from the Forgas and "all that part of the SE1/4 SE1/4 lying west of the centerline of Sugarloaf Creek . . . . Containing in the aggregate 188.121 acres more or less." A survey was conducted for Mr. Hill before the sale. The survey stated that the tract of land in the Southeast Quarter of the Southeast Quarter lying west of Sugarloaf Creek contained 8.47 acres, not two acres. When it was discovered in 1999 that the Forgas had not conveyed the land they owned in the SE1/4 SE1/4 to the Bensons, they executed a deed conveying to the Bensons "[a]ll that part of the SE1/4 SE1/4 lying west of the centerline of Sugarloaf Creek, Section 36, Township 4 South, Range 23 West."

The Southalls paid taxes on the entire 40-acre tract of the SE1/4 SE1/4 from the time that they purchased it in 1974 until 2000, but Mr. Southall testified that he always considered that he owned only 38 acres, as stated in his deed. After the Hills' survey was conducted and

given to the county assessor's office, a change in the Southalls' tax bill caused Mr. Southall to investigate. He discovered that a survey had been conducted for the Hills; that, according to the survey, the area west of the creek contained—not two acres—but 8.47 acres; and that Mr. Hill claimed ownership of the entire parcel west of the creek.

On March 28, 2004, the Southalls brought a quiet-title action against the Hills, requesting the court to quiet title in them to "[p]art of the SE1/4 SE1/4, SECTION 36, TOWNSHIP 4 SOUTH, RANGE 23 WEST, MONTGOMERY COUNTY, ARKANSAS LYING WEST OF SUGARLOAF CREEK, containing 6.47 acres more or less." In support of their petition, the Southalls claimed that they had paid taxes on the property under color of title. The Hills filed an answer denying the Southalls' claim, requesting the court to confirm title to the property described in the petition in the Hills, and praying that the court dismiss the Southalls' petition.

At trial, the Southalls proceeded under the theory that they had color of title to the property for more than seven years and, during that time, had continuously paid taxes thereon. *See* Ark. Code Ann. § 18-60-506 (Repl. 2003). The trial court held that the Southalls silently acquiesced in the location of a fence which ran along the west bank of Sugarloaf Creek as the visible boundary line and quieted title in the Southalls to "that portion of the disputed land lying east of the fence line." The Southalls filed this appeal, arguing that (1) the trial court erred in failing to quiet title to the 38 acres in them under the principles of adverse possession; (2) the trial court erred in finding that the disputed land west of

Sugarloaf Creek beyond the fence line was the property of appellees because appellees failed to prove that they or their predecessors in title owned the land by adverse possession; and (3) the trial court erred in finding that the Southalls silently acquiesced in the location of the fence line.

The Hills respond, arguing that the Southalls did not raise either the common-law elements of adverse possession or adverse possession pursuant to Ark. Code Ann. § 18-11-106 in the trial court and, therefore, those claims are barred. They argue further that the Southalls did not prove that they had color of title to any lands lying west of Sugarloaf Creek and, therefore, their claim under Ark. Code Ann. § 18-60-506 (Repl 2003) also fails. Finally, the Hills assert that the trial court correctly determined that the Southalls acquiesced in the location of the fence line.

For their first point on appeal, the Southalls argue that the trial court erred in failing to quiet title to the disputed 6.47 acres in them. While the Southalls' sole argument in the trial court was that they had acquired title to the disputed land through adverse possession by holding the property under color of title and paying taxes on it for more than seven years, they add an argument on appeal that they adversely possessed the disputed land under Ark. Code Ann. §18-11-106 (Repl. 2003), which requires the adverse claimant to prove color of title and payment of taxes for seven years in addition to proving all of the common-law

elements of adverse possession.[1] Because the Southalls neither argued and presented evidence of the elements of adverse possession to the trial court nor obtained a ruling from the trial court on this claim, they have not preserved this issue for appellate review. *See Thompson v. Fischer*, 364 Ark. 380, ___ S.W.3d ___ (2005).

We now turn to the Southalls' claim that the trial court erred in failing to quiet title to the disputed tract in them because they proved that they held the property under color of title and paid taxes on the it for more than seven years. Although there was no dispute that the Southalls had indeed paid taxes for twenty-nine years on the entire quarter section, including the disputed 6.47 acres, they did not hold the 6.47 acres under "color of title." "[I]n adverse possession under color of title, the actual possession, by presumption of law, is constructively limited to the instrument which provides color of title." *Utley v. Ruff*, 255 Ark. 824, 827, 502 S.W.2d 629, 632 (1973).

> Color of title is not, in law, title at all. It is a void paper, having the semblence of a muniment of title, to which, for certain purposes, the law attributes certain qualities of title. *Its chief office or purpose is to define the limits of the claim under it. Nevertheless, it must purport to pass title.* In form, it must be a deed, a will, or some other paper or instrument by which title usually and ordinarily passes. Such qualities as are imputed to it by the law, for limited purposes, are purely ficticious and are accorded to it only to work out just results. Fictions are never used in procedure or law for any other purpose.

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[1]To establish title by adverse possession, the adverse claimant must prove that he has been in possession of the property continuously for more than seven years and that his possession was visible, notorious, distinct, exclusive, hostile, and with intent to hold against the true owner. *McLaughlin v. Sicard*, 63 Ark. App. 212, 216, 977 S.W.2d 1, 3 (1998).

Weast v. Hereinafter Described Lands, 33 Ark. App. 157, 158-59, 803 S.W.2d 565, 566 (1991) (quoting *Bailey v. Jarvis*, 212 Ark. 675, 680, 208 S.W.2d 13, 15 (1948) (quoting *State v. King*, 87 S.E. 170 (W. Va. 1915))) (emphasis added).

The instrument under which the Southalls claimed color of title was their deed, which conveyed to them "that part of the Southeast Quarter (SE1/4) of the Southeast Quarter (SE1/4) lying East of Sugar Loaf Creek (38 Acres)." They did not present any instrument in the trial court purporting to convey to them any land lying west of Sugarloaf Creek. Therefore, they failed to present color of title to the disputed 6.47-acre tract, all of which was located west of Sugarloaf Creek. They argue that the conveyance in their deed of 38 acres constituted color of title to the 6.47 acres west of the creek. Specifically, they claim that, because the acreage east of the creek encompasses less than 38 acres, their deed must be construed to include the remaining acreage east of the creek to comprise the entire 38 acres. We disagree. Arkansas law is clear that in deeds "quantity yields to course and distance, and course and distance to artificial and natural objects." *Wyatt v. Ark. Game & Fish Comm'n*, 360 Ark. 507, 514, 202 S.W.3d 513, 518 (2005). The court explained in *Wyatt* stating:

> This court held in *Turner v. Rice,* 178 Ark. 300, 10 S.W.2d 885 (1928), that the acreage mentioned in a government call of lands, even without the words "more or less," does not control or dominate the description. Wherever one is granted land by government call, he takes the whole of the call without reference to the amount of acreage added to the description. *Id.* "In other words, if one is deeded the northeast quarter of any particular section containing any particular number of acres, he would take the whole quarter section, irrespective of the number of acres mentioned." *Id.* at 303, 10 S.W.2d 885.

> Later, in *Tedford,* 201 Ark. 789, 146 S.W.2d 918, citing *Scott* and *Turner,* this court held that in the absence of an express averment or covenant as to quantity, the quantity mentioned in the deed does not control the description of the granted premises. The applicable rule is that where the instrument contains words of qualification, such as "more or less" or words of similar import, the statement of quantity of acres conveyed is a mere matter of description, and not of the essence of the contract, and the purchaser takes the risk of quantity, there being no fraud or gross mistake. *Hays v. Hays,* 190 Ark. 751, 81 S.W.2d 926 (1935). The mention of quantity of acres, after a certain description of the subject by metes and bounds, or by other known specifications, is but a matter of description, and does not amount to any covenant, or afford ground for the breach of any of the usual covenants, though the quantity of acres should fall short of the given amount. *Id.* In *Hays,* the court wrote, "whenever it appears, by definite boundaries, or by words of qualification, as 'more or less' or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed is mere matter of description and not of the essence of the contract, as a general rule, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case.

Id.

The fact that the Southalls' deed stated that the legal description consisted of 38 acres, when it may actually consist of only 32 acres, does not give the Southalls color of title to land not described in the deed. Their deed gave them land lying east of the creek. It does not constitute "color of title" for land lying west of the creek.

For their second point on appeal, the Southalls argue that the trial court erred in finding that the disputed land west of Sugarloaf Creek beyond the fence line was the property of appellees because appellees failed to prove that they or their predecessors in title acquired title to the land by adverse possession. We reject the Southalls' argument. In an action to quiet title, the plaintiff must recover on the strength of his own title and not on the weakness

of the defendant's title. *Wyatt*, 360 Ark. at 513, 202 S.W.3d at 517. The Southalls filed this action to quiet title to land that they did not own by any instrument of title—that is, 6.47 acres lying west of Sugarloaf Creek. The Hills' deed, however, conveyed to them "all that part of the SE1/4 SE1/4 lying west of the centerline of Sugarloaf Creek." The trial court found that the Southalls failed to prove that they owned this property through adverse possession. For the reasons explained above, we hold that the trial court's decision was not clearly erroneous.

Finally, the Southalls claim that the trial court erred in finding that they silently acquiesced in the location of the fence line. Specifically, they argue that they owned 38 acres, 6.47 acres of which was west of the creek and the fence. They claim that any use of this property by the Hills or their predecessors in title was permissive and not silent acquiescence of a boundary. The Hills claim that the fence served as a boundary for thirty years and that the testimony clearly reflected that there was consent to the location of the fence as a boundary line.

The location of a boundary line is a question of fact, and we will affirm a trial court's finding of fact with regard to the location of a boundary line unless the finding is clearly erroneous. *Robertson v. Lees*, 87 Ark. App. 172, 181, 189 S.W.3d 463, 469 (2004). A finding is clearly erroneous when, although there is evidence to support it, we are left with the definite and firm conviction that a mistake has been committed. *Id*. Whether a boundary line by acquiescence exists is to be determined upon the evidence in each individual case.

Clark v. Casebier, 92 Ark. App. 472, ___, ___ S.W.3d ___, ___ (2005). In reviewing a trial court's findings of fact, we give due deference to the trial judge's superior position to determine credibility of the witnesses and the weight to be accorded to their testimony. *Id*. A boundary line by acquiescence is inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line. *Id*. It is also settled law that a boundary line by acquiescence may exist without the necessity of a prior dispute. *Walker v. Walker*, 8 Ark. App. 297, 651 S.W.2d 116 (1983). Whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line and thus apparently consent to that line, it becomes the boundary by acquiescence. *Id*. at 298-99, 651 S.W.2d at 117.

In this case, the testimony indicated that the fence existed when the Southalls obtained the property in 1974. Mr. Southall testified that Donald Dumler, who had worked for him since 1983, maintained the fence for over twenty years. He also said that, when his cows would occasionally get around the fence or Mr. Benson's cows would cross over to his side of the fence, they would put the cows back and fix the fence. Mr. Dumler testified that the fence line followed the creek and that the fence was there when he began working for Mr. Southall in 1983. The Hills both testified that, in addition to keeping cows on the property, they and their predecessors fertilized, bush hogged, and otherwise maintained the land on the west side of the fence. Giving due deference to the trial court's superior position to determine credibility of the witnesses and the weight to be accorded to their testimony, we

hold that its decision finding that the fence was a boundary line by acquiescence is not clearly erroneous.

Affirmed.

GLADWIN and BAKER, JJ., agree.